In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 544

FRANCESCO FOTI a/k/a FRANK FOTI, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE RESPONDENT

The issue in this case, as limited by the order granting certiorari, is whether denial of an application to suspend the deportation of a concededly deportable alien is a "final order of deportation" directly reviewable by a court of appeals under Section 106 of the Immigration and Nationality Act, as added by Public Law 87-301, § 5(a), 75 Stat. 651, approved September 26, 1961, 8 U.S.C. (1958 ed.,

Supp. IV) 1105a.[1] Since the grant of the writ, it has come to our attention that Congress, on October 24, 1962 (four days subsequent to the filing of the petition for certiorari), enacted a statute, Public Law 87-885, 76 Stat. 1247, the fourth section of which amended Section 244 of the Immigration and Nationality Act so as to provide, in pertinent part, in a new subsection, (f), as follows (8 U.S.C. (1958 ed., Supp. IV) 1254(f)):

> (f) No provision of this section shall be applicable to an alien who (1) entered the United States as a crewman; * * *.

Section 244 is the source of the Attorney General's discretionary authority to suspend the deportation of aliens who meet the eligibility requirements prescribed in the section. It is undisputed that petitioner entered the United States as a crewman (R. 1-2, 8). This memorandum is filed in order to bring the changed circumstances to the Court's attention and to consider the question whether the case continues to present a live controversy.

1. The relevant facts in this litigation are as follows:

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[1] As pointed out in the government's memorandum acquiescing in certiorari, the court below and the Ninth Circuit are of the view that relief must be sought from the district court, whereas the Seventh Circuit has held that the Attorney General's denial of discretionary relief under the immigration laws is directly reviewable in the court of appeals. The issue continues to arise in variant forms. See, *e.g.*, *Giova* v. *Rosenberg*, October Term, 1962, No. 898 Misc., petition for certiorari pending.

Petitioner, whose deportability is undisputed (R. 1, 8), applied at his deportation hearing for the privilege of suspension of deportation under Section 244 as it read at the time of the hearing (June 9, 1961). The special inquiry officer denied the application on the ground that petitioner failed to qualify under the "hardship" test prescribed by subsection (a) (8 U.S.C. 1254(a)) and hence was ineligible for such relief.[2] The Board of Immigration Appeals affirmed this determination (R. 1-3).[3] Petitioner thereafter applied to the Court of Appeals for the Second Circuit, under Section 106 of the Act, 8 U.S.C. (1958 ed., Supp. IV) 1105a, for review of the administrative determination. That court, holding that it was without jurisdiction for the reason that the challenged determination was not a "final order of deportation" within the meaning of Section 106, dismissed the petition (R. 8-35, 36). The pending writ was issued to review this judgment (R. 37).

2. If it were undisputed or clear beyond peradventure that the relief sought by petitioner could no longer be granted because of a supervening act of Congress, it would be appropriate to vacate the judgment below and to remand the cause with instructions

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[2] The special inquiry officer further held—as an alternative basis for his order of denial—that, even if minimum eligibility requirements were assumed for purposes of the decision, the relief sought should in any event be denied as a matter of discretion.

[3] The Board did not consider the special inquiry officer's alternative basis of denial (see preceding footnote). It simply held petitioner ineligible for the relief sought (R. 2, 3).

to dismiss the petition for review as moot, *United States* v. *Munsingwear*, 340 U.S. 36. If, however, there is an arguable issue on the merits, *i.e.*, on the question whether petitioner may still be eligible for the relief which he seeks, it would seem to be the orderly course for this Court to consider the jurisdictional issue which it has already undertaken to review and to pretermit all other issues.

Several considerations support this conclusion. First, there is the precept, almost invariably followed, that if there is a threshold question as to jurisdiction, the federal courts will dispose initially of that issue. Second, there is the consideration that the lower court in this case has not gone beyond the jurisdictional question, and ordinarily this Court will not reach out to decide issues on the merits which the lower courts have not yet had an opportunity to consider. Third, the jurisdictional issue is a recurrent one that it would be provident to decide even though it were deemed rather unlikely that this particular petitioner will be able to prevail on the merits.

3. We turn therefore to the question whether it is clear beyond peradventure that petitioner is barred from obtaining relief by the 1962 amendment of Section 244. Under the plain language of that amendment, the Attorney General no longer has authority to grant suspension of deportation to aliens who entered this country as crewmen. Since petitioner is in that class, he is ineligible unless the saving clause of the Immigration and Nationality Act of 1952 applies to the application for suspension of deportation here involved. Certainly, if the saving clause is

not applicable, petitioner cannot prevail even if it be assumed, *arguendo*, that the Attorney General erred when he failed, at an earlier date, to grant suspension of deportation. Cf. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78; *Vandenbark* v. *Owens-Illinois Glass Co.*, 311 U.S. 538, 541-542; *Duplex Co.* v. *Deering*, 254 U.S. 443, 464; *The Peggy*, 1 Cranch 103, 110; *Fassilis* v. *Esperdy*, 301 F. 2d 429, 431-434 (C.A. 2), affirming 192 F. Supp. 84, 86-87 (S.D.N.Y.); *United States ex rel. Wiczynski* v. *Shaughnessy*, 185 F. 2d 347, 349 (C.A. 2). And see *United States* v. *Alabama*, 362 U.S. 602.[4]

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[4] In *Ziffrin, Inc.* v. *United States, supra*, the question was whether the Interstate Commerce Commission, in passing upon an application for a contract carrier permit, was required to give effect to a change in the law which became effective subsequent to the filing of the application and the hearing thereon, but prior to the entry of the Commission's order. Holding that the Commission was bound to give effect to the law as it stood when the Commission acted, the Court said (318 U.S. at 78):

> It is unnecessary, however, to decide whether the Commission correctly applied §210 [of the Motor Carrier Act] as originally enacted to such common control as the Commission found in appellant and Ziffrin Truck Lines, Inc. We are convinced that the Commission was required to act under the law as it existed when its order of May 29, 1941, was entered. The [contract carrier] permit was effective for the future and the amendment forbade persons under common control holding both a permit and a certificate [as a common carrier]. * * * A change in the law between a nisi prius and an appellate decision requires the appellate court to apply the changed law. [Citing cases.] *A fortiori*, a change of law pending an administrative hearing must be followed in relation to permits for future acts. Otherwise the administrative body would issue orders contrary to existing legislation.

Petitioner, we presume, would argue that, since the 1962 amendment involved a change in the basic 1952 statute, Congress intended the saving provision of the latter Act to apply. This provision (§ 405(a), 66 Stat. 280, 8 U.S.C. 1101, Note) reads as follows:

> Sec. 405.(a) Nothing contained in this Act, unless otherwise specifically provided therein, shall be construed to affect the validity of any declaration of intention, petition for naturalization, certificate of naturalization, certificate of citizenship, warrant of arrest, order or warrant of deportation, order of exclusion, or other document or proceeding which shall be valid at the time this Act shall take effect; or to affect any prosecution, suit, action, or proceedings, civil or criminal, brought, or any status, condition, right in process of acquisition, act, thing, liability, obligation, or matter, civil or criminal, done or existing, at the time this Act shall take effect; but as to all such prosecutions, suits, actions, proceedings, statutes [*sic*], conditions, rights, acts, things, liabilities, obligations, or matters the statutes or parts of statutes repealed by this Act are, unless otherwise specifically provided therein, hereby continued in force and effect. * * * An application for suspension of deportation under section 19 of the Immigration Act of 1917, as amended, * * * which is pending on the date of enactment of this Act, shall be regarded as a proceeding within the meaning of this subsection.
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> * * * *

Although the saving provision is comprehensive in scope, it should be noted that it speaks in terms of "this Act" and "the time this Act shall take effect,"

i.e., December 24, 1952.[5] Moreover, it refers specifically to "application[s] for suspension of deportation *under section 19 of the Immigration Act of 1917, as amended*" (emphasis added)—stating that any such application which "is pending on the date of enactment of this Act" shall "be regarded as a proceeding within the meaning of this subsection." This specificity cuts against a contention that Congress meant the saving provision to apply to future applications for suspension of deportation arising under the 1952 Act in the event that Act should be repealed or amended.

For the reasons summarized above, the government will vigorously argue, whenever the merits may ultimately be reached, that petitioner cannot obtain relief consistently with the 1962 amendment of Section 244. Nonetheless, we do not go so far as to contend that the question is plainly outside the realm of dispute and that this Court should therefore hold the case to be moot.

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[5] See § 407, 66 Stat. 281.

CONCLUSION

We have brought to the Court's attention a possible question as to mootness. We respectfully suggest, however, that the cause should not be dismissed as moot and that this Court, rather than take any further action at this stage of the case, should proceed to receive briefs and hear argument on the jurisdictional issue which it has previously undertaken to review.

ARCHIBALD COX,
Solicitor General.

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